

PROSECUTING ATTORNEY,  
FEE OF SPECIAL PROSECUTOR:

The fee provided by law for a special prosecutor must be taxed and paid as costs in all cases in which such an officer is employed.

January 25, 1952

Filed  
52

Mr. Walter R. Lethem, Jr.  
Prosecuting Attorney  
Nodaway County  
Maryville, Missouri

FILED  
52

Dear Mr. Lethem:

We have given careful consideration to your request for an opinion, which request is as follows:

"In a recent criminal case tried in our county, a Special Prosecuting Attorney was appointed under the provisions of M.R.S. 56.110. The reason that this was necessary was that before I took office as prosecuting attorney I had been appointed by the Court to represent this defendant and had done considerable work on his side of the case. The defendant was found guilty and sentenced to one year in the county jail. He has subsequently been released on parole and one of the provisions of his parole is that he pay the costs of the court action. Section 56.130 of the Statute provides that a special prosecutor shall receive a reasonable fee to be fixed by the Court and to be taxed and paid as other costs in criminal cases.

"It now appears to me that it would be grossly unfair to this defendant to assess the fee of the special prosecutor against him when certainly it is a cost that was incurred through no action

Mr. Walter R. Lethem, Jr.

on the part of the defendant. However, in view of the wording of this statute, I would appreciate an opinion from your office as to whether or not this defendant should have added to the regular court costs the amount of the fee for the special prosecutor appointed under these circumstances."

Section 56.110, RSMo 1949, is as follows:

"If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."

Section 56.130, RSMo 1949, is as follows:

"The person thus appointed shall possess the same power and receive a reasonable fee for each case prosecuted to be fixed by the court and to be taxed and paid as other costs in criminal cases."

Section 56.130 is the revised version of Section 12950, R. S. No. 1939, which provided that a special prosecutor should "receive the same fees as the proper officer would if he were present." This clause became obsolete when the legislature placed prosecuting attorneys on a salary basis and directed the fees of such officers to be paid over to the county treasurer. A special prosecutor then could receive no pay for his services. *State ex rel. v. Patterson et al.*, 152 Mo. App. 264. The legislature restored compensation in the passage of one of its revision bills in 1949, H.B. No. 2014, when Section 56.130 in its present form was enacted.

Mr.. Walter R. Lethem, Jr.

This section has never been construed by the courts. But a well-known principle of law is applicable to the question now under consideration. This rule was stated by the Supreme Court of Missouri in State ex rel. v. Board of Education, 294 Mo. 106. In the course of that opinion, at page 115, the court said; "It is also a cardinal rule that when the language is plain, there can be no construction because there is nothing to construe."

The wording of Section 56.130 seems to be entirely clear. Evidently the legislature intended to make the law apply to all cases alike. We are unable to see anything in the statute to justify the conclusion that an exception could be made. We see no way to read any such construction into the law.

#### CONCLUSION

It is the opinion of this office that the fee provided for a special prosecutor in Section 56.130, RSMo 1949, should be taxed and paid as costs in all cases in which such an officer is employed; that no exception should be made because of any circumstances surrounding the case.

Respectfully submitted,

B. A. TAYLOR  
Assistant Attorney General

APPROVED:

---

J. E. TAYLOR  
Attorney General

BAT/fh